

APPENDIX

A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-11985
Non-Argument Calendar

D.C. Docket Nos. 6:16-cv-02067-ACC-DCI; 6:13-cr-00173-ACC-LRH-1

ALAN GREGORY ENDER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(June 29, 2021)

Before MARTIN, BRANCH, and BLACK, Circuit Judges.

PER CURIAM:

Alan Ender, a federal prisoner proceeding pro se, appeals the district court's denial of his Federal Rule of Civil Procedure 60(b)(6) motion, which the court construed as a request under Federal Rule of Appellate Procedure 4(a)(6) to reopen the time to file an appeal from the denial of Ender's 28 U.S.C. § 2255 motion. Ender argues the district court misconstrued his Rule 60(b) motion and incorrectly focused on his counsel's failure to notify him of the denial of his § 2255 motion when, in fact, his Rule 60(b) motion also concerned attorney abandonment. After review,¹ we affirm.

The statutory time limit for filing a notice of appeal in a civil case is a jurisdictional requirement. *Bowles v. Russell*, 551 U.S. 205, 214 (2007); *see also Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 16 (2017). In a civil case where the United States is a party, the appellant must file a notice of appeal no later than 60 days after the challenged order or judgment is entered on the docket. Fed. R. App. P. 4(a)(1)(B)(i); 28 U.S.C. § 2107(b)(1). A district court may not extend the time to file a notice of appeal, except as authorized by Rule 4. Fed. R. App. P. 26(b)(1).

¹ We review a district court's denial of a request to reopen the time to file an appeal for an abuse of discretion. *See McDaniel v. Moore*, 292 F.3d 1304, 1305 (11th Cir. 2002). We review de novo the interpretation of the rules of federal procedure. *United States v. Lopez*, 562 F.3d 1309, 1311 (11th Cir. 2009).

Federal Rule of Appellate Procedure 4(a)(6) “provides the exclusive method for extending a party’s time to appeal for failure to receive actual notice that a judgment or order has been entered.” *Vencor Hosps., Inc. v. Standard Life & Accident Ins. Co.*, 279 F.3d 1306, 1311 (11th Cir. 2002). Under Rule 4(a)(6), the district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if: (1) the moving party did not receive notice of the judgment within 21 days of its entry; (2) the motion is filed within 180 days after the judgment is entered or within 14 days after the moving party receives notice of the judgment, whichever is earlier; and (3) the court finds that no party would be prejudiced. Fed. R. App. P. 4(a)(6); 28 U.S.C. § 2107(c). Therefore, the rule provides an outer limit of 180 days for a party who fails to receive timely notice of the entry of judgment. *Vencor*, 279 F.3d at 1310-11.

The district court did not err in construing Ender’s Rule 60(b)(6) motion as a motion to reopen the time to file an appeal under Rule 4(a)(6). Ender filed his Rule 60(b) motion for relief from judgment in April of 2020—more than two years after the district court denied his § 2255 motion in March of 2018. In his Rule 60(b) motion, Ender did not challenge the judgment itself or anything that produced it. Instead, his complaint was only that his counsel did not timely notify him of the judgment and file a notice of appeal. The court therefore did not err in construing Ender’s motion as seeking to reopen the appeal period under Rule

4(a)(6), which provides the exclusive method for extending the time to appeal based upon a lack of notice of the entry of judgment. *See Vencor*, 279 F.3d at 1311; *see also Sanders v. United States*, 113 F.3d 184, 187 (11th Cir. 1997) (stating that when a pro se appellant alleges he did not receive timely notice of the entry of judgment, this Court will treat his notice of appeal as a Rule 4(a)(6) motion). Ender could not use Rule 60(b) “to circumvent the 180-day limitation set forth in Rule 4(a)(6).” *See Vencor*, 279 F.3d at 1311; Fed. R. App. P. 26(b)(1).

Ender argues the district court should have analyzed his motion under Rule 60(b)(6) because he was seeking relief based not only on lack of notice of the judgment, but also based on attorney abandonment. Ender argued in his Rule 60(b) motion that after learning in December of 2019 that his § 2255 motion had been denied, he repeatedly asked his attorney to file an out-of-time appeal, but his attorney failed to do so. But even assuming this was adequate to raise an attorney abandonment argument in the district court, Ender provides no support for the proposition that attorney neglect or abandonment can provide an equitable exception to Rule 4. *See Bowles*, 551 U.S. at 214 (stating courts have “no authority to create equitable exceptions to jurisdictional requirements”); *see also Jackson v. Crosby*, 437 F.3d 1290, 1296 (11th Cir. 2006) (holding petitioner could not use Rule 60(b) to “resuscitate the time to file an appeal” where petitioner’s attorney failed to file a timely tolling motion).

Having properly construed Ender's motion as requesting relief under Rule 4(a)(6), the district court did not abuse its discretion in denying the motion, which was filed far beyond the 180-day outer time limit Rule 4(a)(6) provides. *See* Fed. R. App. P. 4(a)(6); 28 U.S.C. § 2107(c); *Vencor*, 279 F.3d at 1310-11.

Accordingly, we affirm.

AFFIRMED.

APPENDIX

B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ALAN GREGORY ENDER,

Petitioner,

v.

Case No: 6:16-cv-2067-Orl-22TBS

UNITED STATES OF AMERICA,

Respondent.

ORDER

This cause comes before the Court on Petitioner's Motion for Relief pursuant to Rule 60(b), Fed. R. Civ. P. ("Motion for Relief," Doc. 12), filed *pro se*.¹ Petitioner requests the Court set aside the judgment and leave to file a notice of appeal. (Doc. 12 at 1). For the reasons that follow, the Court construes Petitioner's motion as a request to reopen the time to file an appeal, pursuant to Rule 4(a)(6), Federal Rules of Appellate Procedure, and denies the motion.

I. Procedural Background

On July 10, 2013, Petitioner was charged by indictment with ten counts of production of child pornography, in violation of 18 U.S.C. § 2251(a) and (e) (counts one

¹ The Court notes that Petitioner filed this motion *pro se*. However, David J. Joffe is counsel of record for Petitioner. Typically, Petitioner's motions would be stricken because he is represented by counsel. However, Petitioner notes that he is filing the motion *pro se* after mailing several letters, certified, to counsel and receiving no response. (Doc. 12 at 8-9; Doc. 12-1 at 3, 4). The Court, therefore, will consider the merits of Petitioner's motion.

through ten) and one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2) (count eleven). (Criminal Case number 6:13-cr-173-Orl-22TBS, Doc. 1).² Petitioner entered into a plea agreement and pleaded guilty to counts one, four, and eleven of the indictment; the remaining counts were dismissed. (Crim. Case Docs. 27; 60 at 33). The Court sentenced Petitioner to consecutive 300-month terms of imprisonment on counts one and four and to a concurrent term of 240 months' imprisonment on count eleven. (Crim. Case Docs. 45; 60 at 28-29). Petitioner appealed, and the Eleventh Circuit Court of Appeals affirmed his convictions and sentences. (Crim. Case Docs. 49; 66); *United States v. Ender*, 628 F. App'x 1014 (11th Cir. 2015).³

Petitioner then moved, through counsel, to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. ("Motion to Vacate," Doc. 1). The Government filed a response in opposition to the Motion to Vacate (Doc. 5), and Petitioner filed a reply. (Doc. 7). On March 28, 2018, the Court denied the Motion to Vacate and denied Petitioner a certificate of appealability. (Doc. 10). Judgment was entered in favor of the Government on March 29, 2018. (Doc. 11).

² Criminal Case number 6:13-cr-173-Orl-22TBS will referred be to as "Criminal Case" or "Crim. Case."

³ The Eleventh Circuit affirmed the sentence but "vacate[d] the judgment and remand[ed] for the limited purpose of correcting a clerical error in the judgment." (Crim. Case Doc. 66); *United States v. Ender*, 628 F. App'x 1014, 1015, 1017 (11th Cir. 2015). The corrected judgment was entered on January 6, 2016. (Crim. Case Doc. 68).

In the Motion for Relief presently before the Court (Doc. 12), Petitioner claims that notice of the Court's denial of the Motion to Vacate was sent to Petitioner's counsel of record, David J. Joffe, who did not notify Petitioner. (Doc. 12 at 2). In August 2019, Petitioner contacted counsel for an update on the status of the Motion to Vacate. (Doc. 12 at 6). Petitioner did not receive a response, and he contacted counsel twice more in December 2019. (*Id.*). Counsel responded by letter at the end of December 2019, explaining that in March 2018 the Court denied both Petitioner's Motion to Vacate and a certificate of appealability and that counsel's practice was to mail to his clients "everything as [he] receive[ed] it." (*Id.* at 6-7). Petitioner contacted counsel in January and February 2020, asking counsel to move for an out-of-time appeal, but did not receive a response. (Doc. 12 at 7-8). Petitioner now requests the Court set aside the judgment, and Petitioner seeks leave to file a notice of appeal. (Doc. 12 at 1). He also requests that the Clerk provide him a copy of the order denying his Motion to Vacate. (Doc. 12-11).

II. Analysis

Rule 60(b), Fed. R. Civ. P., provides:

[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b)(1)–(6).

Petitioner has not demonstrated any basis for relief under the first five subsections of Rule 60, Fed. R. Civ. P. He states that he has yet to receive the Court’s order denying his Motion to Vacate and that counsel did not make him aware of the reasons for the denial of his claims. (Doc. 12 at 4, 8). Instead, Petitioner focuses his arguments on counsel’s alleged failure to notify him of the denial of the Motion to Vacate and relies on subsection six which provides that “the court may relieve a party . . . from a final judgment, order, or proceeding for . . . any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(6); (Docs. 12 at 3–4; 12-1 at 5).

However, “Rule 4(a)(6) [of the Federal Rules of Appellate Procedure] provides the exclusive method for extending a party’s time to appeal for failure to receive actual notice that a judgment or order has been entered.” *Vencor Hosps. Inc. v. Standard Life & Accident Ins. Co.*, 279 F.3d 1306, 1311 (11th Cir. 2002). *See also* Fed. R. Civ. P. 77(d)(2) (“Lack of notice of the entry [of a court order] does not affect the time for appeal or relieve—or authorize the court to relieve—a party for failing to appeal within the time allowed, except as allowed by Federal Rule of Appellate Procedure (4)(a).”).

Rule 4(a)(6), Fed. R. App. P., provides:

Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

Upon review, Petitioner does not satisfy the requirements of Rule 4(a)(6). First, Rule 77(d) of the Federal Rules of Civil Procedure provides, “[i]mmediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear.” Fed. R. Civ. P. 77(d)(1). Rule 5(b) provides that, “[i]f a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.” Fed. R. Civ. P. 5(b)(1). Petitioner states that the order denying Petitioner’s Motion to Vacate was served on his attorney. (Doc. 12 at 2). Petitioner merely faults his attorney for then failing to notify him.

Second, even if the Court were to find that Petitioner did not receive notice of the denial of his Motion to Vacate within the meaning of Rule 4(a)(6)(A), Petitioner’s request

to reopen the time to file an appeal is untimely under Rule 4(a)(6)(B), as it was filed later than 180 days after entry of the judgment.⁴

Although Petitioner actually moved for relief under Rule 60(b), Fed. R. Civ. P., the Eleventh Circuit has held that Rule 60(b) “cannot be used to circumvent the 180-day limitation set forth in Rule 4(a)(6).” *Vencor*, 279 F.3d at 1311. Regarding the 1991 adoption of Rule 4(a)(6), the Eleventh Circuit explained that

[t]he amendment itself acknowledges the unfairness of enforcing the strict Rule 4(a) deadlines for filing an appeal when a party does not receive notice of a judgment or order. By way of remedying such inequities, the amendment permits an extension of the time to appeal. Such extension, however, is not unlimited. In the interest of protecting the finality of judgments, Rule 4(a)(6) specifically conditions extension on the filing of a motion for relief within 180 days after the judgment or order is entered. Under the plain meaning of Rule 4(a)(6), district courts are authorized to reopen the time for filing an appeal based on lack of notice solely within 180 days of the judgment or order.

Id. at 1310.

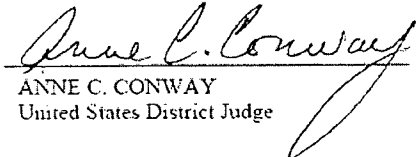
Accordingly, it is **ORDERED** that:

1. Petitioner’s Motion for Relief (Doc. 12) is:
 - a. **GRANTED to the extent that** the Clerk is directed to mail to Petitioner with this order a copy of the order denying the Motion to Vacate (Doc. 10) and a copy of the judgment (Doc. 11);
 - b. otherwise **DENIED**.

⁴ Judgment was entered against Petitioner on March 29, 2018. (Doc. 11). The deadline to move to reopen under Rule 4(a)(6)(B), Fed. R. App. P., was 180 days later — September 25, 2018.

2. Petitioner is **DENIED** a certificate of appealability.⁵
3. Further, within **TEN (10) DAYS** from the date of this order, attorney David J. Joffe shall file a motion to withdraw as counsel for Petitioner if he does not intend to continue representation.

DONE and ORDERED in Orlando, Florida on May 7, 2020.


ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Parties
OrIP-4 5/7

⁵ The Court should grant an application for certificate of appealability only if petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner failed to make a substantial showing of the denial of a constitutional right, and Petitioner cannot show that jurists of reason would find this Court's procedural rulings debatable.

APPENDIX

C

Rule 60. Relief from a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

HISTORY: Amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; March 2, 1987, eff. Aug. 1, 1987; April 30, 2007, eff. Dec. 1, 2007.

Rule 77. Conducting Business; Clerk's Authority; Notice of an Order or Judgment

(a) When Court Is Open. Every district court is considered always open for filing any paper, issuing and returning process, making a motion, or entering an order.

(b) Place for Trial and Other Proceedings. Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing—other than one *ex parte*—may be conducted outside the district unless all the affected parties consent.

(c) Clerk's Office Hours; Clerk's Orders.

(1) Hours. The clerk's office—with a clerk or deputy on duty—must be open during business hours every day except Saturdays, Sundays, and legal holidays. But a court may, by local rule or order, require that the office be open for specified hours on Saturday or a particular legal holiday other than one listed in Rule 6(a)(6)(A).

(2) Orders. Subject to the court's power to suspend, alter, or rescind the clerk's action for good cause, the clerk may:

(A) issue process;

(B) enter a default;

(C) enter a default judgment under Rule 55(b)(1); and

(D) act on any other matter that does not require the court's action.

(d) Serving Notice of an Order or Judgment.

(1) Service. Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear. The clerk must record the service on the docket. A party also may serve notice of the entry as provided in Rule 5(b).

(2) Time to Appeal Not Affected by Lack of Notice. Lack of notice of the entry does not affect the time for appeal or relieve—or authorize the court to relieve—a party for failing to appeal within the time allowed, except as allowed by Federal Rule of Appellate Procedure (4)(a).

HISTORY: Amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Dec. 4, 1967, eff. July 1, 1968; March 1, 1971, eff. July 1, 1971; March 2, 1987, eff. Aug. 1, 1987; April 30, 1991, eff. Dec. 1, 1991; April 23, 2001, eff. Dec. 1, 2001; April 30, 2007, eff. Dec. 1, 2007; April 25, 2014, eff. Dec. 1, 2014.

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) *Time for Filing a Notice of Appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order — but before the entry of the judgment or order — is treated as filed on the date of and after the entry.

(3) *Multiple Appeals.* If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) *Effect of a Motion on a Notice of Appeal.*

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B) (i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) *Motion for Extension of Time.*

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed

time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) *Reopening the Time to File an Appeal.* The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) *Entry Defined.*

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a) does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case.

(1) *Time for Filing a Notice of Appeal.*

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision, sentence, or order — but before the entry of the judgment or order — is treated as filed on the date of and after the entry.

(3) *Effect of a Motion on a Notice of Appeal.*

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order disposing of the last such remaining motion, or within 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order — but before it disposes of any of the motions referred to in Rule 4(b)(3)(A) — becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective — without amendment — to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) *Motion for Extension of Time.* Upon a finding of excusable neglect or good cause, the district court may — before or after the time has expired, with or without motion and notice — extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

~~(5) *Jurisdiction.* The filing of a notice of appeal under this Rule 4(b) does not divest a~~

district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) *Entry Defined.* A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i).

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court docketed the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) **Mistaken Filing in the Court of Appeals.** If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

HISTORY: Amended April 30, 1979, effective Aug. 1, 1979; Nov. 18, 1988, P. L. 100-690, Title VII, Subtitle C, § 7111, 102 Stat. 4419; April 30, 1991, eff. Dec. 1, 1991; April 22, 1993, eff. Dec. 1, 1993; April 27, 1995, eff. Dec. 1, 1995; April 24, 1998, eff. Dec. 1, 1998; April 29, 2002, eff. Dec. 1, 2002; April 25, 2005, eff. Dec. 1, 2005; March 26, 2009, eff. Dec. 1, 2009; April 28, 2010, eff. Dec. 1, 2010; April 26, 2011, eff. Dec. 1, 2011; April 28, 2016, eff. Dec. 1, 2016; April 27, 2017, eff. Dec. 1, 2017.

**Additional material
from this filing is
available in the
Clerk's Office.**
